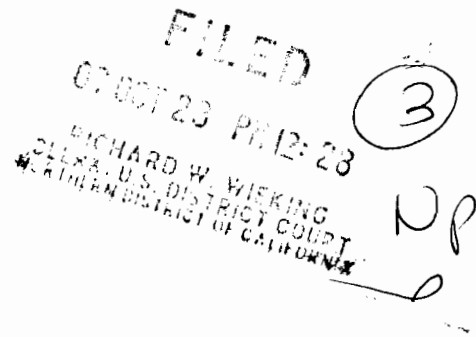


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EDL

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA SAN FRANCISCO

ALBERT WRIGHT, JR. and MARVA JOE  
GREEN WRIGHT,

Plaintiff(s),

vs.

A.W. CHESTERTON COMPANY, INC.,  
et al.

Defendants.

(C) 07-274382  
U.S.D.C. No. \_\_\_\_\_

San Francisco Superior Court Case No.  
CGC-07-274382

FOSTER WHEELER LLC'S NOTICE OF  
REMOVAL

TO THE HONORABLE JUDGE OF UNITED STATES DISTRICT COURT:

Pursuant to Title 28 U.S.C. § 1442(a)(1) and 1446, Defendant Foster Wheeler, LLC ("Foster Wheeler"), gives notice of removal of an action filed against it in the Superior Court of the State of California, County of San Francisco, to the United States District Court for the Northern District of California. In support, Foster Wheeler respectfully offers the following:

**Preliminary Matters**

1. On September 13, 2007, Plaintiffs filed this lawsuit, entitled *Albert Wright, Jr. and Marva Joe Green Wright*, Case No. 07-274382 against Foster Wheeler and numerous

1 other defendants in the Superior Court of the State of California, San Francisco County.  
2 (See Summons and Complaint, attached hereto as Exhibit A.)

3 2. Plaintiffs served Foster Wheeler with Plaintiffs' Summons and Complaint  
4 on or around September 28, 2007. The Complaint includes allegations that Albert Wright,  
5 Jr. was injured as a result of exposure to asbestos while serving in the United States Navy  
6 and aboard Navy ships. (Exhibit A.) More specifically, there are allegations of exposure  
7 while working on, among other ships, the USS Constellation between 1973 and 1995. (*Id.*  
8 at Exhibit A.)

9 3. Thus, this Notice of Removal is timely filed in that it is filed within thirty  
10 (30) days after the first receipt by Foster Wheeler of Plaintiffs' initial pleadings from  
11 which it ascertained that this case is removable. (28 U.S.C. § 1446(b).)

#### 12 **Nature Of The Case**

13 4. The case is based on plaintiffs' allegations that Albert Wright, Jr.'s asbestos-  
14 related disease, specifically lung cancer, was caused by his exposure to asbestos dust  
15 and/or fibers.

16 5. Plaintiffs assert failure to warn claims along with strict liability and  
17 negligence claims against Foster Wheeler and the other defendants based on various  
18 theories.

#### 19 **Grounds For Removal**

20 6. This Notice of Removal is filed within thirty (30) days of Plaintiffs' service  
21 of the Summons and Complaint. (28 U.S.C. § 1446(b).) Foster Wheeler manufactured  
22 marine boilers and auxiliary equipment, including economizers, for use on Navy ships  
23 pursuant to contracts and specifications executed by the Navy. Foster Wheeler has  
24 confirmed that its boilers were on the USS Constellation. The basis for removal is that, in  
25 the manufacture and sale of boilers and economizers for the Navy, including all aspects  
26 of warnings associated with that equipment, Foster Wheeler was acting under an officer  
27 or agency of the United States within the meaning of 28 U.S.C. § 1442(a)(1).

28 7. Should Plaintiffs file a motion to remand this case, Foster Wheeler

1 respectfully requests an opportunity to respond more fully in writing, but offers the  
2 following authorities at this time:

3 8. As recognized in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 504 (1988),  
4 Foster Wheeler has a federal defense to this action, *i.e.*, government contractor immunity  
5 from liability for injuries arising from any exposure to asbestos related to boilers and  
6 auxiliary equipment on board Navy vessels, insofar as they were constructed or repaired  
7 by Foster Wheeler. Removal pursuant to 28 U.S.C. § 1442(a)(1) is appropriate where the  
8 moving party can (1) demonstrate that it acted under the direction of a federal officer, (2)  
9 raise a colorable federal defense to Plaintiffs' claims, and (3) demonstrate a causal nexus  
10 between Plaintiff's claims and acts it performed under color of federal office. (*Mesa v.*  
11 *California*, 489 U.S. 121, 124-25, 129-31, 134-35 (1989).)

12 9. One New York Federal Court has reviewed this issue as recently as  
13 February 2004. In *Isaacson v. Dow Chemical Company*, 304 F.Supp.2d 442 (E.D.N.Y. 2004),  
14 plaintiff originally sued the manufacturer of Agent Orange in New Jersey State Court.  
15 Defendants removed to federal court asserting, among other things, federal jurisdiction  
16 under the All Writs Act. (*Id.* at 445.) The New Jersey District Court found removal  
17 appropriate under the All Writs Act. (*Id.*) The case was then transferred to the Eastern  
18 District of New York by the Multidistrict Panel. (*Id.*) The Court of Appeals for the Second  
19 Circuit affirmed the district court's denial of remand finding jurisdiction appropriate  
20 under the All Writs Act. (*Stephenson v. Dow Chemical Company*, 273 F.3d 19 (2d Cir. 2003).)  
21 On review, the United States Supreme Court remanded the case finding that the All  
22 Writs Act alone would not support removal. (*Dow Chemical Company v. Stephenson*, 539  
23 U.S. 111 (2003).) On remand from the Supreme Court, the Second Circuit determined  
24 that jurisdiction could not be grounded in the All Writs Act and remanded the case back  
25 to the Eastern District of New York to determine if there was an alternative ground  
26 supporting federal jurisdiction. (*Stephenson v. Dow Chemical Company*, 346 F.3d 19 (2d Cir.  
27 2003).) It is with that extensive procedural history that the district court examined the  
28 federal officer removal statute and found it sufficient to deny plaintiff's motion to

1 remand. (*Isaacson*, 304 F.Supp. at 445.)

2 10. In reaching its conclusion, the *Isaacson* court discussed in detail the three  
3 elements necessary for removal under this statute. First, a defendant must demonstrate  
4 that it is a "person" within the meaning of the statute. (*Id.* at 446.) The definition of a  
5 "person" includes a corporation. (*Id.*) Second, the defendant must establish that the suit  
6 is "for any act under color of federal office," i.e., there is a causal connection between the  
7 charged conduct and asserted official authority. (*Id.* [citations omitted].) Causation exists  
8 if the predicate acts of the state court suit were undertaken while the person was acting  
9 as or under a federal officer, and the acts were under color of the relevant federal office.  
10 *Id.* Third, defendants must raise a colorable claim to a federal law defense. (*Id.*) As  
11 previously stated, a colorable claim to a federal defense can be predicated upon the  
12 federal government contractor defense. (*Id.* at 449.)

13 11. The second element requires a causal nexus between the defendant's  
14 actions under the federal officer and plaintiff's state court claims. (*Id.* at 447.) A  
15 substantial degree of direct and detailed federal control over defendant's work is  
16 required. (*Id.*) What constitutes sufficient federal control is often central to a court's  
17 decision to uphold removal or remand a case. Several courts have upheld removal  
18 because defendants were sued as a result of building products pursuant to military  
19 specifications. (See *Crocker v. Borden*, 852 F.Supp. 1322 (E.D.La. 1994)(holding that  
20 removal was proper for Westinghouse because its marine turbines were manufactured  
21 pursuant to Navy specifications); see also, *Pack v. AC and S, Inc.*, 838 F.Supp. 1099 (D.Md.  
22 1993)(holding that removal was proper for Westinghouse because the government had  
23 extensive control over the manufacture of turbines, even specifying the type of asbestos  
24 cloth).) Not all courts agree, however, on the amount of federal control necessary to  
25 uphold removal under this statute.

26 12. Certain courts have not always viewed this issue consistently. Prior to the  
27 *Isaacson* case, the Eastern District Court of New York remanded a similar matter  
28 involving Agent Orange. In *Ryan v. Dow Chemical Company*, 781 F.Supp. 934, 950



(E.D.N.Y. 1992), the district court remanded the case because it found that the control by the government was not sufficient to meet the requirements of section 1442(a)(1). The district court reasoned that the government sought only to buy a ready-to-order herbicide from the defendant and did not cause or control the production of the unwanted byproduct, dioxin, which was the alleged cause of the injuries. *Id.*

13. In discussing *Ryan*, the *Isaacson* court acknowledged that it was a contradictory decision. (*Isaacson*, 304 F.Supp. at 445.) It declared, however, that the *Ryan* decision was "no longer persuasive" and went on to discuss Fifth Circuit cases that specifically rejected the *Ryan* conclusion. (See *Winters v. Diamond Shamrock Chemical Co.*, 149 F.3d 387, 392 (5th Cir. 1998)(holding that manufacturer of Agent Orange was entitled to removal pursuant to the federal officer removal statute); see also, *Miller v. Dow Chemical Company*, 275 F.3d 414, 417 (5th Cir. 2001)(also holding that manufacturer of Agent Orange was entitled to removal pursuant to the federal officer removal statute).) The *Isaacson* court denied remand based on facts that were almost identical to those in *Ryan*. The *Isaacson* court concluded that the government ordered specifications differed from the specifications for the defendants' commercial application of the product. (*Isaacson*, *supra* at 450.) In addition, the method of warning and application was completely in the government's hands. (*Id.*) Finally, the government had full knowledge of the dioxin "problem" inherent in the production of Agent Orange. (*Id.*) These factors demonstrated the control with which the government operated and, thus, warranted a different holding than *Ryan*. (*Id.*)

14. This analysis also applies to "failure to warn" cases where "there is evidence that the government was involved in the decision to give, or not to give, a warning." (*Kerstetter v. Pacific Scientific Co.*, 210 F.3d 431, 438 (5th Cir.) *cert. denied* 531 U.S. 919 (2000).) The Court of Appeals for the Fifth Circuit has made it clear that the government contractor defense is available in "failure to warn" claims where the evidence shows that the lack of a warning reflects governmental direction or control rather than the unfettered discretion of the product's manufacturer, and applies wherever: 1) the

1 government approved or authorized the warnings which the plaintiff contends were  
2 inadequate or incomplete; 2) the warnings provided by the manufacturer conformed to  
3 the warnings as approved or authorized by the government; and 3) the manufacturer  
4 warned the government as to any product hazards known by the manufacturer but  
5 unknown by the government. (*Kerstetter*, 210 F.3d at 438.)

6 15. As stressed in *Kerstetter*, "[t]he government need not prepare the  
7 specifications to be considered to have approved them." (*Id.* at 435.) The only material  
8 issue is whether the manufacturer's designs and specifications were subjected to  
9 "substantial review" rather than a mere "rubber stamp" approval. (*Id.*) While this  
10 determination is necessarily fact specific, "substantial review" has plainly been shown  
11 upon evidence of a "'continuous back and forth' between the contractor and the  
12 government." (*Id.*) In this regard, "[t]he specifications need not address the specific defect  
13 alleged; the government need only evaluate the design feature in question." (*Id.*) Once  
14 again, applying these general principles to "failure to warn" claims, the fact that  
15 governmental specifications or regulations did not specifically preclude the exact  
16 warning desired by the plaintiff does not take a "failure to warn" claim outside the scope  
17 of the government contractor defense so long as the government was involved generally  
18 as to the issue of product warnings (or specifically approved the warnings provided by  
19 the contractor) and was generally aware of the hazard in question. (*Id.* at 438.) Stated  
20 another way, "[i]nadequacy [of a warning] is not an issue when it is the government's  
21 warning in the first place." (*Id.* at 438.)

22 16. The present case is substantially similar to *Kerstetter*, *supra*. As explained  
23 by J. Thomas Schroppe:

24 The Navy exercised intense direction and control over all written  
25 documentation to be delivered with its naval boilers...The Navy required  
26 that every piece of equipment be supplied with a defined number of copies  
27 of one or more technical manuals. Navy personnel participated intimately  
28 in the preparation of this kind of information and exercised specific

1 direction and control over its contents. These manuals included safety  
2 information related to the operation of naval boilers and economizers only  
3 to the extent directed by the Navy.

4 Furthermore, the Navy had precise specifications, practices and procedures  
5 that governed the content of any communication affixed to machinery  
6 supplied by Foster Wheeler to the Navy. Foster Wheeler would not be  
7 permitted, under the specifications, associated regulations and procedures,  
8 and especially under actual practice as it evolved in the field, to affix any  
9 type of warning or caution statement to a piece of equipment intended for  
10 installation onto a Navy vessel, beyond those required by the Navy.

11 (See Affidavit of J. Thomas Schroppe attached hereto as Exhibit B at ¶¶ 21 and 22.) Thus,  
12 the presence or absence of warnings regarding Foster Wheeler equipment was strictly  
13 controlled by the Navy - and a clear basis for removal exists under § 1442(a)(1).

14 17. In further support of the removal, Foster Wheeler provides the Affidavit of  
15 Admiral Ben J. Lehman, U.S. Navy, Ret. (See Affidavit of Admiral Lehman attached  
16 hereto as Exhibit C.) Admiral Lehman joined the Navy in 1942 and worked as Ship  
17 Superintendent and Planning Officer at the Brooklyn Navy Yard between 1942 and 1944,  
18 as Ship Superintendent at the San Francisco Naval Shipyard from 1950 to 1952, and as  
19 Planning Officer at the Assistant Industrial Manager Office in San Francisco from 1952 to  
20 1954. (*Id.* at ¶ 1.) During his tenure in the Navy and as Ship Superintendent, Admiral  
21 Lehman was personally involved with the supervision and oversight of ship alterations  
22 and equipment over hauls at the Brooklyn Navy Yard. (*Id.* at ¶ 3.) Admiral Lehman  
23 states in his Affidavit the Navy controlled every aspect of the design and manufacture of  
24 equipment intended for installation on Navy vessels and that the Navy could not, and  
25 did not, permit its contractors to implement changes from military specifications. (*Id.* at  
26 ¶¶ 2 and 3.) He further states:

27 The U.S. Navy would not have allowed its equipment suppliers, such as Foster  
28 Wheeler, to affix any warning related to any asbestos hazards on their equipment.



1 This would have included boilers. Further, the U.S. Navy would not have allowed  
 2 Foster Wheeler to place any warnings related to asbestos hazards in any written  
 3 material provided by Foster Wheeler to the U.S. Navy or to a U.S. Navy  
 4 contractor in accordance with its contracts, including its technical and operations  
 5 manuals. To do so would have interfered with the U.S. Navy's mission and  
 6 control of its ships and personnel.

7 (*Id.* at ¶ 14.)

8 Clearly, the Schroppe and Lehman Affidavits support federal removal jurisdiction  
 9 under 28 U.S.C. § 1442(a)(1) and the federal nexus to Foster Wheeler's actions has been  
 10 established.

11 18. A properly removed case cannot be remanded for discretionary or policy  
 12 reasons such as allegedly related state court cases or a contention that judicial economy  
 13 compels remand. (28 U.S.C. § 1447(c); *Thermitron Products, Inc. v. Hermansdorfer*, 423 U.S.  
 14 336 (1976).) The federal officer removal statute is not narrow or limited, and it should not  
 15 be frustrated by a narrow or grudging interpretation of § 1442(a)(1). (*Willingham v.*  
 16 *Morgan*, 395 U.S. 402, 405 (1960).)

17 19. Foster Wheeler is not required to notify and obtain the consent of any other  
 18 defendant in this action in order to remove plaintiffs' action as a whole under  
 19 § 1442(a)(1). (See *Torres v. CBS News*, 854 F.Supp. 245 (S.D.N.Y. 1994).)

20 21. As required by 28 U.S.C. § 1446(b) and the local rules of this Court, true and  
 21 correct copies of the process and pleadings served upon Foster Wheeler are being filed  
 22 with this Notice of Removal.

### 23 **Conclusion**

24 22. Removal of this action is proper under 28 U.S.C. § 1442, because it is a civil  
 25 action brought in a state court, and the federal district courts have original jurisdiction  
 26 over the subject matter under 28 U.S.C. § 1442(a)(1) because Foster Wheeler was acting  
 27 under an officer or agency of the United States.

28 THEREFORE, Foster Wheeler, pursuant to these statutes and in conformance with

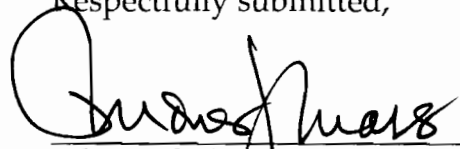


1 the requirements set forth in 28 U.S.C. § 1446, removes this action for trial from the  
2 Superior Court of the State of California, County of San Francisco, on this 23<sup>rd</sup> day of  
3 October, 2007.

4 Dated: October 23, 2007

BRYDON HUGO & PARKER  
Respectfully submitted,

By:



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Thomas J. Moses  
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FOSTER WHEELER LLC

4801-1661